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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

8  
9 United States of America,  
10 Plaintiff,

No. CR 11-2265-PHX-JAT-003

**ORDER**

11 v.

12 Rafiq Brooks, et al.,  
13 Defendants.

14 Pending before the Court is Defendant Rafiq Brooks' (1) Motion to Suppress  
15 Statements (*Miranda* and Voluntariness) (Doc. 99); (2) Motion to Suppress Evidence  
16 (Firearm and Ammunition) Based Upon Involuntary Consent to Search (Doc. 105); (3)  
17 Motion to Suppress Evidence (No Probable Cause for Arrest or Reasonable Suspicion for  
18 Stop) (Doc. 121) and (4) Motion to Sever Defendant (Doc. 129). The Court now rules on  
19 the Motions.

20 **I. FACTUAL BACKGROUND**

21 In March 2011, Special Agents and Task Force Officers of the DEA began an  
22 investigation into a Jamaican Drug Trafficking Organization ("DTO"). The DTO was  
23 suspected of packaging bulk marijuana and then either distributing or shipping the  
24 packages to others for further distribution. During the course of the investigation, DEA  
25 agents suspected that four locations were being used by the DTO: (1) 2329 S. 93rd  
26 Avenue, Tolleson, Arizona, the residence of Bianca McKinney (the "Tolleson House");  
27 (2) 17212 N. Scottsdale Road, #2072, Scottsdale, Arizona, at the Pillar at Scottsdale  
28 Apartment Complex (the "Scottsdale Apartment"); (3) 6610 North 93rd Avenue, #3096,

1 Glendale, Arizona, at the Pillar at Westgate Apartment Complex (the "Glendale  
2 Apartment"); and (4) 1601 E. Highland, #1180, Phoenix, Arizona (the "Highland  
3 Apartment").

4 Specifically, Detective Kurt Kinsey testified as follows:

5 During a separate investigation involving Kurt Davis ("Davis") not at issue here,  
6 investigators placed a pole camera on the Tolleson House. Investigators suspected that  
7 Davis was visiting the Tolleson House in rental vehicles for the purpose of obtaining  
8 marijuana and shipping it to the East Coast. During that investigation, Detective Kinsey  
9 and Officer Anthony Morse put a Global Positioning Satellite ("GPS") device on a green  
10 Chevrolet Avalanche that they suspected was being used to ship the marijuana. Through  
11 the GPS on the Avalanche, investigators were led to the Scottsdale Apartment.

12 During surveillance of the Scottsdale Apartment, investigators observed several  
13 black males coming in and out of the apartment and meeting there. They also observed  
14 several rental vehicles visiting the apartment and saw people bring packing peanuts and  
15 flat boxes into the garage of the Scottsdale Apartment. Investigators learned that Bianca  
16 McKinney, whose known residence was the Tolleson House, was on the lease of the  
17 Scottsdale Apartment.

18 In April 2011, investigators observed two Hispanic males enter the Scottsdale  
19 Apartment carrying a blue shopping bag and exit the apartment carrying the same bag,  
20 which appeared to have considerable weight added to it. After the two men left the  
21 apartment, investigators conducted a traffic stop on them and found approximately  
22 \$296,000 in the bag in addition to some marijuana shavings. Thereafter, on April 26,  
23 2011, investigators observed a black Taurus leave the garage of the Scottsdale Apartment  
24 and drive to the post office where the driver dropped two boxes off. A warrant was  
25 issued and U.S. Postal Inspector Jeff Agster located marijuana inside the boxes.

26 On August 18, 2011, investigators observed two black males moving furniture  
27 from the Scottsdale Apartment into a U-Haul truck. Bianca McKinney and another  
28 female arrived in a white Honda Civic and appeared to be assisting in the moving

1 process. Investigators then followed the U-Haul truck to the Glendale Apartment.  
2 Investigators learned that Bianca McKinney was on the lease at the Glendale Apartment.  
3 Investigators placed a pole camera on the Jobing.com Arena, which pointed toward the  
4 Glendale Apartment. Through pole camera surveillance, investigators saw a pattern of  
5 rental cars driving to the Glendale Apartment and saw packing supplies brought into the  
6 apartment. Investigators thought that this was a similar pattern to that which they  
7 witnessed at the Tolleson House.

8 On November 9, 2011, Detective Kinsey placed a GPS device on the bottom of a  
9 silver Buick. Detective Kinsey and Officer Nelson, partially using the GPS, then  
10 followed the Buick to the Highland Apartment. Detective Kinsey and Officer Nelson  
11 followed the vehicle from the Highland Apartment to the post office where they observed  
12 an individual later identified as Defendant mailing a parcel containing 4.5 kilograms of  
13 marijuana. Defendant testified that he did not know there was marijuana in the box that  
14 he dropped off at the post office. Defendant testified that someone asked him to ship the  
15 box, but that he could not remember who told him to ship the box.

16 Officer Morse testified as follows:

17 On November 17, 2011, he was watching pole camera surveillance of the Glendale  
18 Apartment when he noticed what he considered to be suspicious activity. Specifically,  
19 Officer Morse observed a blue Chevrolet rental car and a silver Buick rental car<sup>1</sup> driving  
20 into the garage of the Glendale Apartment and the garage door shutting. Based on this  
21 surveillance, Officer Morse and other detectives started en route to the Glendale  
22 Apartment. About 20 minutes later, before any investigator arrived at the Glendale  
23 Apartment, pole camera surveillance observed the two rental cars exit the garage of the  
24 Glendale Apartment.

25 Based on his knowledge of the prior use of the Highland Apartment, Detective

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26  
27 <sup>1</sup> Officer Morse testified that, in his experience with this investigation, whenever  
28 rental cars that had not been seen by investigators in the past were pulled into garages for  
short periods of time, drug trafficking activities were taking place.

1 DiPiazza thought the cars may be headed toward the Highland Apartment. Accordingly,  
2 Officer Morse and other investigators went to the Highland Apartment rather than the  
3 Glendale Apartment. Detective Chris DiPiazza was the first to arrive at the Highland  
4 Apartment and Officer Morse was the second to arrive. Shortly after Officer Morse  
5 arrived, other investigators arrived on scene. The Highland Apartment complex is gated,  
6 but, during the day, the gate is left open. Just outside the gate, there is a front office with  
7 some parking. When Officer Morse arrived, he drove around the parking lot of the  
8 complex and observed a silver Buick that he thought was the same Buick that left the  
9 Glendale Apartment earlier that day.

10 While Officer Morse was sitting in his parked vehicle, he observed a subject exit  
11 the Highland Apartment, walk around the parking lot and return to the apartment to open  
12 the garage door. Officer Morse suspected that the subject was conducting counter  
13 surveillance. Thereafter, Officer Morse observed a white truck occupied by three  
14 individuals enter the complex and pull into the garage of the Highland Apartment. The  
15 garage was immediately shut when the truck pulled in.

16 Co-defendant Johnson then exited the Highland Apartment and drove a white  
17 Chrysler from visitor parking to a place near the garage of the Highland Apartment.  
18 Thereafter, an individual, later identified as co-defendant Williams, exited the Highland  
19 Apartment carrying a black suitcase. Co-defendant Williams placed the black suitcase in  
20 the trunk of the Chrysler and went back into the Highland Apartment. Based on his  
21 experience, the fact that two known marijuana traffickers were using the residence, and  
22 the fact that subjects had been seen mailing marijuana after leaving the Highland  
23 Apartment, Morse believed that there was money or marijuana inside the suitcase.  
24 Officer Morse then instructed a unit outside of the complex to conduct a traffic stop on  
25 co-Defendant Johnson. Johnson's vehicle was then stopped just outside the gated portion  
26 of the apartment.

27 As Ms. Johnson's vehicle was being stopped, the white Ford truck began to exit  
28 the garage of the Highland Apartment. Officer Morse then pulled his vehicle around with

1 his lights and sirens on. He yelled to the three occupants of the white Ford truck to put  
2 their hands up, but they would not comply. Officer Rhonda Aquipel was approaching the  
3 truck and Officer Morse drew his weapon and also began approaching the truck because  
4 the occupants would not comply with his commands. Officer Morse then ordered the  
5 occupants out of the vehicle and, as he approached, smelled marijuana and saw money  
6 scattered over the cab of the truck (later determined to be approximately \$13,000). All  
7 three occupants of the white truck were then handcuffed.

8 Officer Morse noticed people inside the Highland Apartment, which was on the  
9 second floor, looking through the blinds. Officer Morse was concerned because the  
10 evidence suggested that a drug transaction had taken place and persons inside the  
11 apartment could have weapons.

12 At the same time, Detective DiPiazza and Officer Chris Crescione were  
13 conducting a traffic stop of co-Defendant Johnson's vehicle on the other side of the  
14 apartment building.<sup>2</sup> Officer Morse could not see that traffic stop.

15 Officer DiPiazza testified that, as the Chrysler driven by Johnson was leaving the  
16 complex, he blocked the exit and made verbal contact with the driver. Officer DiPiazza  
17 testified that, as he was speaking with Johnson, Officer Crescione was covering him.  
18 Officer Crescione testified that, while he was assisting Detective DiPiazza with the traffic  
19 stop, he saw someone, later identified as co-defendant Williams, standing in the window  
20 of the Highland Apartment. Detective DiPiazza testified that Williams kicked out the  
21 screen of the window. Officer Crescione testified that he ordered the person to go back  
22 inside and, when the person failed to obey his commands, he drew his weapon and  
23 ordered the person back inside the house. Officer Crescione testified that he never  
24 ordered anyone out of the apartment, but thought that the officers and detectives on the  
25 other side of the apartment may have ordered people to come out of the apartment.

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26  
27 <sup>2</sup> Officer Morse testified that, after obtaining consent to search the Chrysler from  
28 Johnson, a bale of marijuana was found in the black suitcase that Williams had placed  
inside the truck.

1 Detective DiPiazza testified that he was extremely concerned that co-defendant Williams  
2 was going to jump from the window, as Detective DiPiazza had witnessed a suspect  
3 attempt a similar jump and break his leg about two weeks prior to this incident.

4 Officer Morse testified that, as he was detaining the white truck, the front door of  
5 the apartment opened and people began exiting the apartment. The first person to exit,  
6 co-defendant White, had a handgun in his waistband and four other men followed him  
7 out of the apartment with their hands up. Morse testified that there were only three  
8 officers in the front of the apartment and he was concerned about the safety of the  
9 officers, especially because they were outnumbered.

10 Specifically, Officer Morse testified that the ideal ratio for officer safety is one  
11 officer for each suspect. Officer Morse testified that, when the five men exited the  
12 apartment, the investigators were dealing with eight suspects, including the men in the  
13 white truck, and there were only three investigators on scene at that time. Officer Morse  
14 testified that he was also concerned that there were additional people still inside the  
15 apartment and there were not enough investigators to control all of the potential threats.  
16 Officer Morse testified that, based on this concern, he and the other officers secured the  
17 weapon and handcuffed the five individuals that exited the apartment and the three  
18 individuals in the white truck. Defendant was one of the individuals that exited the  
19 apartment and was then handcuffed.

20 Officer Morse testified that, when the five men exited the apartment, they left the  
21 front door open behind them and he then approached the door to see if he could see any  
22 other occupants inside. Officer Morse testified that he then smelled marijuana emanating  
23 from inside the apartment and heard water running inside.<sup>3</sup> Officer Morse testified that it  
24 was then decided that the investigators would do a protective sweep of the apartment to  
25 ensure that there was no one else inside that would pose a threat to the officers' safety

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27 <sup>3</sup> Officer Morse testified that it was his understanding that a sink was running in  
28 the kitchen directly upstairs from the front door.

1 and to make sure that evidence was not being destroyed. Officer Morse testified that,  
2 during the protective sweep, investigators observed numerous bales of marijuana and  
3 drug packaging supplies in plain view and the apartment appeared to be used solely for  
4 the packaging of marijuana. Officer Morse testified that the apartment appeared to be  
5 used solely for packaging drugs and, based on his experience, a drug trafficker would not  
6 allow anyone to enter the apartment who was not also involved in the drug trafficking  
7 activity. The following day, a search warrant for the apartment was obtained and a full  
8 search was executed. Defendant testified that he never smelled or saw marijuana in the  
9 Highland Apartment.

10 Officer Morse testified that, after Defendant was handcuffed, Officer Morse read  
11 Defendant his *Miranda* rights from a Scottsdale Police Department issued *Miranda* card.  
12 Officer Morse testified that Defendant told him that he understood his rights. Officer  
13 Morse testified that Defendant had a key for a Buick in his possession and Officer Morse  
14 then asked Defendant if the silver Buick belonged to him and Defendant replied that it  
15 did. Officer Morse testified that he asked Defendant if Defendant rented the silver Buick  
16 and Defendant responded affirmatively. Officer Morse testified that he asked Defendant  
17 if there was anyone else on the rental contract and Defendant responded that a woman  
18 was also on the rental contract.<sup>4</sup> Officer Morse testified that he asked Defendant if he  
19 could search the vehicle and Defendant responded that he could search the vehicle.  
20 Officer Morse testified that, when he asked Defendant whether he could search the  
21 vehicle, Defendant was sitting on the curb, there were no weapons drawn, Defendant's  
22 demeanor was normal, and Officer Morse believed Defendant's responses were  
23 voluntary.

24 Defendant testified that, on November 17, he was in the Highland Apartment  
25 taking a nap on the couch when he heard people in the apartment with him running  
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27 <sup>4</sup> During his testimony, Officer Morse could not remember if Defendant said it  
28 was his girlfriend or wife that was also on the rental contract for the silver Buick.

1 around and someone outside saying “come out with your hands up.” Defendant testified  
2 that, while he was handcuffed, Officer Morse found the keys to the Buick in his pocket  
3 and immediately asked Defendant if the Buick belonged to him, to which Defendant  
4 responded yes. Defendant testified that Morse then asked Defendant if he could search  
5 the Buick and Defendant said yes. Defendant testified that another officer then took the  
6 remaining items in his pockets.

7 Defendant testified that Officer Morse did not read Defendant his *Miranda* rights  
8 until after he had obtained consent to search the car. Defendant testified that, when  
9 Officer Morse asked whether he could search the vehicle, Defendant told him “go ahead”  
10 “because I knew there was nothing in the car.” Defendant testified that he told Officer  
11 Morse that his girlfriend was also on the rental contract for the car. Defendant testified  
12 that he was not sure if he would have given consent if everything had not happened so  
13 fast.

14 All persons detained at the Highland Apartment, including Defendant, were  
15 arrested and transported to the Scottsdale Police Department holding facility.

16 DEA Special Agent Cecilia Strabala testified that, after his arrest at the Highland  
17 Apartment, Defendant was initially interviewed by Agent Strabala, with Scottsdale Police  
18 Department Detectives Mendoza and Penttinen witnessing the interview. Agent Strabala  
19 testified that she again read Defendant his *Miranda* rights and Defendant acknowledged  
20 his rights. Agent Strabala testified that, during the interview, Defendant confirmed he  
21 was at the Highland Apartment, but indicated he only knew one “homie” at that  
22 apartment. Agent Strabala testified that, when she asked Defendant who his homie was,  
23 he gave no response. Agent Strabala testified that Defendant then indicated he did not  
24 want to talk anymore or answer any other questions regarding anything that happened.

25 Officer Strabala testified that she then stopped the interview. Officer Strabala  
26 testified that, during this interview with Defendant, Defendant sat with his body pointed  
27 away from her and refused to make eye contact with her. Officer Strabala testified that it  
28 was not clear to her whether Defendant did not want to speak to any investigator or



1 whether he just did not want to speak to her personally. Officer Strabala testified that, as  
2 soon as Defendant told her he did not want to talk to her, she immediately ceased asking  
3 Defendant questions. Defendant testified that he told Officer Strabala that he did not  
4 want to answer more questions and she stopped answering questions.

5 Officer Morse testified that, at approximately 3:00 a.m., Officer Morse and  
6 Detective DiPiazza contacted Defendant in the jail interview room after interviewing  
7 other suspects arrested on scene. Officer Morse testified that he confirmed with  
8 Defendant that he had previously been advised of his rights by Agent Strabala. Officer  
9 Morse testified that he was not aware that Defendant had previously invoked his right to  
10 remain silent to Agent Strabala. Officer Morse and Detective DiPiazza testified that  
11 Defendant did not provide any inculpatory statements and denied involvement in any  
12 drug trafficking. Officer Morse and Detective DiPiazza testified that the interview was  
13 then terminated when Defendant told Morse and DiPiazza that he did not want to talk to  
14 them.

15 Defendant testified that Officer Morse did confirm that Defendant had previously  
16 been read his rights. In his motion, Defendant claims that, during this interview, Morse  
17 and DiPiazza threatened Defendant with longer interrogation if he did not cooperate and,  
18 when Defendant asked to call family members, he was told he would be allowed to do so  
19 only if he answered their questions. Officer Morse and Detective DiPiazza testified that  
20 they never threatened Defendant and did not condition calling family members upon his  
21 answering questions.

## 22 **II. Motion to Suppress Statements (*Miranda* and Voluntariness) (Doc. 99)**

23 First, Defendant argues that his rights were violated when he was questioned at the  
24 Highland Complex without being advised of his *Miranda* rights. As a result, Defendant  
25 seeks to suppress the statement that he made to Officer Morse that he had rented the  
26 silver Buick.<sup>5</sup>

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27  
28 <sup>5</sup> Although, in his motion, Defendant denies that he made any statements to

1 Second, Defendant argues that the statements he made to Morse and DiPiazza<sup>6</sup> at  
2 the interview that occurred around 3:00 a.m. should be suppressed because that interview  
3 was a violation of Defendant's right to remain silent, which Defendant argues he clearly  
4 invoked at the conclusion of the previous interview with Agent Strabala.

5 Finally, Defendant argues that his statements made to Officer Morse at the  
6 Highland Complex and his statements to Morse and DiPiazza at the 3:00 a.m. interview  
7 should be suppressed because they were involuntary.

8 The Court will address each of Defendant's arguments in turn.

9 **A. Whether Statements Made at the Highland Complex**  
10 **Should be Suppressed based on a *Miranda* Violation**

11 Defendant seeks to suppress the statements he made to Officer Morse at the  
12 Highland Complex because he was not first advised of his *Miranda* rights before being  
13 questioned by Officer Morse. Officer Morse testified that he read Defendant his *Miranda*  
14 rights from a Scottsdale Police Department issued *Miranda* card before asking any  
15 questions. The Court finds that Officer Morse's testimony was credible and Defendant's  
16 testimony that Officer Morse did not read him his *Miranda* rights until after questioning  
17 him was not credible. Accordingly, the Court finds that Defendant was read his *Miranda*  
18 rights before being questioned by Officer Morse and, accordingly, no statements made to  
19 Officer Morse at the Highland Complex will be suppressed based on a *Miranda* violation.

20  
21 Officer Morse regarding ownership or rental of the Buick, Defendant testified that his  
22 girlfriend rented the Buick for him.

23 <sup>6</sup> Defendant does not specifically identify any statements that should be  
24 suppressed from this interview. The Government points out that Defendant made no  
25 inculpatory statements during that interview and that Defendant's denial of any  
26 knowledge of the firearm in the Buick should not be admitted unless Defendant  
27 determines to testify about it. Accordingly, it appears that there are no statements to be  
28 suppressed and this issue is moot. However, because Defendant submitted a motion and  
did not withdraw the motion upon receiving the Government's response, the Court will  
assume, for the purposes of this Order, that Defendant seeks to suppress any and all  
statements made during the 3:00 a.m. interview with Morse and DiPiazza.

1                    **B.     Whether Statements Made During the 3:00 a.m. Interview**  
2                    **Should Be Suppressed based on a Violation of**  
3                    **Defendant's Right to Remain Silent**

4                    Defendant argues that the statements he made to Morse and DiPiazza at the  
5                    interview that occurred around 3:00 a.m. at the Police Department should be suppressed  
6                    because that interview was a violation of Defendant's right to remain silent, which  
7                    Defendant argues he clearly invoked at the conclusion of the previous interview with  
8                    Agent Strabala.

9                    **1.     Legal Standard**

10                  Because individuals have a Fifth Amendment right not to incriminate themselves,  
11                  once an individual invokes their right to remain silent, such invocation must be  
12                  "scrupulously honored." *See U.S. v. Hsu*, 852 F.2d 407, 409 (9th Cir. 1988) (citing  
13                  *Michigan v. Mosely*, 423 U.S. 96, 104 (1975)). To determine if an individual's  
14                  invocation of the right to remain silent has been scrupulously honored, the Court takes a  
15                  flexible, case-by-case approach taking account of all the relevant circumstances. *Id.* at  
16                  410. Among the factors the Court considers are "the amount of time that elapsed  
17                  between interrogations, the provision of fresh warnings, the scope of the second  
18                  interrogation, and the zealotness of officers in pursuing questioning after the suspect has  
19                  asserted the right to silence." *Id.* at 410. Two of the most important factors are whether  
20                  fresh *Miranda* warnings were given and whether there was actual coercion by police  
21                  upon the suspect in order to extract information. *Id.* at 410-411.

22                  **2.     Analysis**

23                  Defendant argues that the factors weigh in favor of finding that his right to remain  
24                  silent was not scrupulously honored because (1) instead of giving fresh warnings, Morse  
25                  simply confirmed that Defendant had been previously Mirandized, (2) Morse and  
26                  DiPiazza threatened Defendant with longer incarceration and would not let him call his  
27                  family members until he answered their questions and (3) Morse and DiPiazza were  
28                  dishonest with Defendant in telling him that he previously admitted that he was the only

1 driver of the silver Buick, which Defendant denies admitting, “in a clear attempt to  
2 convince Defendant to change his mind and waive his *Miranda* rights.” (Doc. 99 at 14).  
3 In Response, the Government argues that Defendant’s rights were scrupulously honored.

4 The second interview occurred eight hours after Defendant had invoked his right  
5 to remain silent and was initiated by Morse and DiPiazza, who were unaware that  
6 Defendant had invoked his right to remain silent to Strabala, and who had been  
7 interviewing other suspects that were arrested at the Highland Complex. At the  
8 suppression hearing, Morse and DiPiazza testified that that they did not make any threats  
9 to Defendant regarding longer incarceration or refuse to allow him to phone his family  
10 members if he did not answer their questions.

11 The Court finds that, under all of the relevant circumstances, Defendant’s right to  
12 remain silent was scrupulously honored. Defendant told Strabala that he did not want to  
13 answer further questions and Strabala immediately ceased questioning Defendant.  
14 Approximately eight hours later, Morse and DiPiazza again attempted to interview  
15 Defendant. Although they did not administer fresh *Miranda* warnings, they did confirm  
16 with Defendant that he had previously been Mirandized and, in fact, Defendant admits  
17 that he had previously that same night been Mirandized twice. The Court finds that  
18 Morse and DiPiazza’s testimony that they did not threaten Defendant to be credible.  
19 Finally, after answering only a few questions, which the Government contends were not  
20 inculpatory, Defendant felt free to and did invoke his right to remain silent again. At that  
21 time, Morse and DiPiazza immediately stopped their questioning. Accordingly, based on  
22 the relevant circumstances, Defendant’s right to remain silent was not violated.

23 **C. Whether Statements Made at the Highland Complex and**  
24 **During the 3:00 a.m. Interview Should be Suppressed as**  
25 **Involuntary**

26 Defendant also argues that the statements he made to Task Force Officer Tony  
27 Morse and Detective Chris DiPiazza at the Scottsdale Police Department District Three  
28 Jail interview room on November 18, 2011 at around 3:00 a.m. and a statement he made  
to Officer Morse immediately following his arrest at 1:45 p.m. on November 17, 2011

1 should be suppressed.

2 Defendant argues that his statements to Officer Morse should be suppressed  
3 because they were involuntary, as they were given after Defendant had been ordered at  
4 gunpoint to exit the apartment, handcuffed, forced to lie on the ground and then to sit on  
5 the curb, and at all times surrounded by officers with weapons.

6 Defendant argues that his statements to Morse and DiPiazza should be suppressed  
7 because they were involuntary because Defendant was confined in a windowless room in  
8 the jail, sleep-deprived at 3:00 a.m., and threatened by Morse and DiPiazza.

### 9 **1. Legal Standard**

10 Even after a *Miranda* waiver, the Government must establish the voluntariness of  
11 a confession by a preponderance of the evidence. *United States v. Kelley*, 953 F.2d 562,  
12 564 (9th Cir. 1992) (overruled on other grounds by *United States v. Kim*, 105 F.3d 1579,  
13 1581 (9th Cir. 1997)). A “confession is involuntary only if the police use coercive means  
14 to undermine the suspect’s ability to exercise his free will.” *Pollard v. Galaza*, 290 F.3d  
15 1030, 1033 (9th Cir. 2002), *cert. denied* 537 U.S. 981 (2002); *Henry v. Kernan*, 197 F.3d  
16 1021, 1026 (9th Cir. 1999). Impermissible coercive activity can include lengthy  
17 questioning, deprivation of food or sleep, physical threats of harm, and psychological  
18 persuasion. *Kelley*, 953 F.2d at 565. When a suspect alleges psychological coercion, the  
19 relevant question is whether the suspect’s will was overborne when he confessed. *United*  
20 *States v. Miller*, 984 F.2d 1028, 1031 (9th Cir. 1993).

21 “A court . . . is required to determine, in light of the totality of the circumstances,  
22 whether a confession was made freely, voluntarily and without compulsion or  
23 inducement of any sort.” *Ortiz v. Uribe*, 671 F.3d 863, 869 (9th Cir. 2011) (internal  
24 citation and quotation marks omitted). A defendant’s “personal characteristics . . . are  
25 constitutionally irrelevant absent proof of coercion.” *Derrick v. Peterson*, 924 F.2d 813,  
26 818 (9th Cir. 1990) (internal citation and quotation omitted).

### 27 **2. Analysis**

28 With regard to the statements made to Officer Morse at the Highland Complex,

1 although investigators had their guns drawn when Defendants exited the Highland  
2 Apartment, and Defendant was handcuffed, when questioned by Officer Morse, no  
3 investigators were pointing weapons at Defendant or threatening him in any way. Officer  
4 Morse read Defendant his *Miranda* rights and then asked him a few questions. Although  
5 other investigators were milling around the scene and had weapons, there is no  
6 suggestion that those investigators were focused on Defendant or were acting in a  
7 menacing manner in order to give Defendant the impression that he was being threatened  
8 unless he answered questions. Defendant testified that he gave consent to search the car  
9 because he knew there was nothing in it and everything happened so fast. Defendant did  
10 not testify that he answered questions or gave consent because he was coerced into it by  
11 Officer Morse. Simply being handcuffed is not enough to overcome Defendant's will.  
12 Accordingly, under the totality of circumstances, Defendant's statements made to Officer  
13 Morse at the Highland Apartment were given voluntarily and will not be suppressed.

14 With regard to the statements made to Officer Morse and Detective DiPiazza at  
15 3:00 a.m., the Court has already found that Officer Morse and Detective DiPiazza did not  
16 threaten Defendant. Although Defendant may have been unable to sleep because he was  
17 in a holding cell with other individuals, there is no suggestion that investigators prevented  
18 him from sleeping or attempted to deprive him of sleep to coerce him into answering  
19 their questions. Further, the Court again notes that there is no evidence that Defendant  
20 gave any incriminatory statements during the second interview and thus, there is nothing  
21 to suppress from such interview. Under the totality of the circumstances, Defendant's  
22 statements made to Officer Morse and Detective DiPiazza at the 3:00 a.m. were given  
23 voluntarily and will not be suppressed.

#### 24 **D. CONCLUSION**

25 Based on the foregoing, Defendant's Motion to Suppress Statements (*Miranda* and  
26 Voluntariness) (Doc. 99) is denied.

1                   **III.    Motion to Suppress Evidence (Firearm and Ammunition) Based Upon**  
2                   **Involuntary Consent to Search (Doc. 105)**

3           Defendant also argues that the consent he gave to search the silver Buick at the  
4 Highland Complex was given involuntarily and, thus, the evidence obtained from the  
5 search of the car (the Glock Model 22 handgun and 16 bullets) should be suppressed.

6                   **A.    Legal Standard**

7           “It is well-established that consent is a recognized exception to the Fourth  
8 Amendment’s protection against unreasonable searches and seizures. Nonetheless, it is  
9 the government’s burden to show consent was given ‘freely and voluntarily.’” *U.S. v.*  
10 *Russell*, 664 F.3d 1279, 1281-1282 (9th Cir. 2012) (internal citations omitted). There are  
11 five factors to be considered in determining the voluntariness of consent to a search:

12                   (1) whether defendant was in custody; (2) whether the  
13 arresting officers have their guns drawn; (3) whether *Miranda*  
14 warnings have been given; (4) whether the defendant was told  
15 he has a right not to consent; and (5) whether defendant was  
16 told a search warrant could be obtained. The fact that some of  
these factors are not established does not automatically mean  
that consent was not voluntary.

17 *Id.* (internal citations omitted).

18           In this case, Defendant was in custody, the arresting officers did not have their  
19 guns drawn when he was asked for consent and only Officer Morse was directly  
20 addressing Defendant, Defendant was given his *Miranda* warnings, Defendant was not  
21 told that he had a right to consent, and was not told a search warrant could be obtained.  
22 Accordingly, the fact that Defendant was in custody and was not told that he had a right  
23 not to consent weigh in favor of finding that Defendant’s consent was not given freely  
24 and voluntarily. On the other hand, the remaining factors favor the Government. There  
25 is no suggestion that Defendant was being threatened or implicitly coerced into  
26 consenting to the search of the Buick. As noted above, Defendant testified that he gave  
27 consent to search the car because he knew there was nothing in it and everything  
28 happened so fast. Defendant did not testify that he gave consent because Officer Morse

1 suggested or behaved in any way that made Defendant believe he did not have a choice.

2 Based on the foregoing, Defendant's consent to search the Buick was given freely  
3 and voluntarily and Defendant's Motion to Suppress Evidence (Firearm and  
4 Ammunition) Based Upon Involuntary Consent to Search (Doc. 105) is denied.

5 **IV. Motion to Suppress Evidence (No Probable Cause for Arrest or**  
6 **Reasonable Suspicion for Stop) (Doc. 121)**

7 Defendant also argues that agents lacked probable cause to arrest Defendant  
8 without a warrant. Defendant first argues that he was under arrest when someone ordered  
9 him out of the apartment at gunpoint and there was no probable cause for such an arrest.  
10 Defendant further argues that, even if he was not under arrest when he exited the  
11 Highland Apartment, agents still did not have probable cause to arrest him after he exited.  
12 Defendant argues that the agent's actions were inconsistent with a *Terry* stop and, thus,  
13 probable cause was required to stop/arrest Defendant. As a result, Defendant seeks  
14 suppression of all items found inside the Highland Apartment and the items seized from  
15 the silver Buick.

16 In response, the Government argues that there was reasonable suspicion and/or  
17 probable cause to conduct a *Terry* stop of Defendant when he exited the Highland  
18 Apartment and, after the protective sweep, the officers had probable cause that defendant  
19 was involved with marijuana possession and/or trafficking to lawfully detain and arrest  
20 him.

21 **A. Legal Standard**

22 Generally, probable cause is required for a warrantless arrest. *Michigan v.*  
23 *Summers*, 452 U.S. 692, 700 (1981).

24 Probable cause to arrest exists when officers have knowledge  
25 or reasonably trustworthy information sufficient to lead a  
26 person of reasonable caution to believe that an offense has  
27 been or is being committed by the person being arrested . . .  
28 Alternatively, this court has defined probable cause as  
follows: when under the totality of the circumstances known  
to the arresting officers, a prudent person would have



1 concluded that there was a fair probability that [the  
2 defendant] had committed a crime.

3 *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (internal citations and  
4 quotations omitted; brackets in original).

5 In general, “[a] Terry stop involves no more than a brief stop, interrogation and,  
6 under proper circumstances, a brief check for weapons.” *United States v. Miles*, 247 F.3d  
7 1009, 1012 (9th Cir. 2001) (quoting *United States v. Robertson*, 833 F.2d 777, 780 (9th  
8 Cir. 1987). A Terry stop is permissible under the Fourth Amendment, “if the officer’s  
9 action is supported by reasonable suspicion to believe criminal activity may be afoot.”  
10 *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal quotations omitted).

11 [I]n determining whether an officer had reasonable suspicion,  
12 due weight must be given, not to his inchoate and  
13 unparticularized suspicion, or hunch, but to the specific  
14 reasonable inferences which he is entitled to draw from the  
15 facts in light of his experience[. Reasonable suspicion is less  
16 than probable cause; it is merely a particularized and  
objective basis for suspecting the person stopped of criminal  
activity.

17 *United States v. Crasper*, 472 F.3d 1141, 1147 (9th Cir. 2007) (internal citations and  
18 quotations omitted). The Court should consider the totality of the circumstances in  
19 deciding whether the officers had a particularized and objective basis for suspecting  
20 wrongdoing. *United States v. Terry-Crespo*, 356 F.3d 1170, 1173-74 (9th Cir. 2004).

21 Further, “an investigative detention does not automatically become an arrest when  
22 officers draw their guns . . . use handcuffs . . . or place a suspect in the back of a patrol  
23 car.” *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002) (internal  
24 citations omitted). “Terry accepts the risk that officers may stop innocent people.  
25 Indeed, the Fourth Amendment accepts that risk as well. Courts cannot prevent mistakes  
26 such as this from taking place; we can only ensure that mistakes are kept to a minimum  
27 by requiring officers to act reasonably, for articulable reasons, and not on a hunch.” *Id.*  
28

1 (internal citations and quotations omitted).

2 It is critical that “the officers diligently pursued a means of investigation that was  
3 likely to confirm or dispel their suspicions quickly, during which time it was necessary to  
4 detain the suspect.” *Id.* at 992 (internal quotations and citations omitted).

### 5 **B. Analysis**

6 The Government argues that it had a particularized and objective basis for  
7 suspecting Defendant was involved in criminal activity when it detained him after he  
8 exited the Highland Apartment. The Court agrees. Prior to the surveillance on  
9 November 17, 2011, investigators knew that individuals visiting the Highland Apartment  
10 were involved in the possession and distribution of marijuana. On November 17, 2011,  
11 investigators observed various individuals entering and exiting the Highland Apartment.  
12 Upon stopping the white Ford truck that was parked in the garage of the Highland  
13 Apartment, investigators smelled marijuana and observed a large quantity of cash. When  
14 the occupants of the Highland Apartment observed the white Ford Truck and the Chrysler  
15 being stopped by officers, co-defendant Williams kicked out the window screen and  
16 stood in the window as if he were going to jump.

17 Officer Crescione testified that he ordered Williams back into the Highland  
18 Apartment and all five men exited the apartment. Defendant testified that, while he was  
19 inside the apartment, he heard investigators outside yelling “come out with your hands  
20 up.” Defendant is the only person who testified that investigators ordered the five men  
21 out of the apartment. Officers Morse and Crescione, and Detective DiPiazza all testified  
22 that there were several commands happening at once and each testified that they did not  
23 make or specifically hear anyone make such a command to the people inside the  
24 apartment. Based on this testimony, the Court finds that the five men exited the  
25 apartment voluntarily either because, when Williams was ordered out of the window,  
26 they thought they should exit through the front door or because they thought commands  
27 being made to suspects in the white truck were directed at them.

28 Officer Morse testified that, as the men exited the apartment, he noticed that one

1 of them was carrying a weapon in his waistband and smelled a strong odor of marijuana  
2 in the apartment. Under these circumstances, it was reasonable for investigators to  
3 conduct a *Terry* stop of Defendant, as, based on the totality of the circumstances, it was  
4 reasonable to suspect that Defendant was involved in criminal activity relating to drugs.

5 It was reasonable for investigators, within the parameters of a *Terry* stop to  
6 handcuff Defendant and remove him and the co-defendants from the vicinity of the  
7 Highland Apartment while a protective sweep was performed. It was reasonable for  
8 investigators to secure the Highland Apartment for their safety and handcuff Defendants  
9 to ensure that the Officers' safety was not compromised while the protective sweep was  
10 being performed. *See U.S. v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982) ("police  
11 conducting on-the-scene investigations involving potentially dangerous suspects may  
12 take precautionary measures if they are reasonably necessary. The purpose of the Terry  
13 frisk is to allow the officer to pursue his investigation without fear of violence.") (internal  
14 quotations and citation omitted).

15 Further, in conducting a protective sweep of the apartment, investigators noted  
16 that the apartment contained numerous bales of marijuana and drug packaging supplies.  
17 Accordingly, the Court finds that there was probable cause to arrest Defendant after the  
18 protective sweep because investigators had reason to conclude that there was a fair  
19 probability that Defendant was involved with the activities of the drug trafficking  
20 organization.

21 Based on the foregoing, investigators had reasonable suspicion to conduct a *Terry*  
22 stop of Defendant and probable cause to arrest him. Thus, Defendant's Fourth  
23 Amendment rights were not violated and Defendant's Motion to Suppress Evidence (No  
24 Probable Cause for Arrest or Reasonable Suspicion for Stop) (Doc. 121) is denied.

## 25 V. CONCLUSION

26 Based on the foregoing,

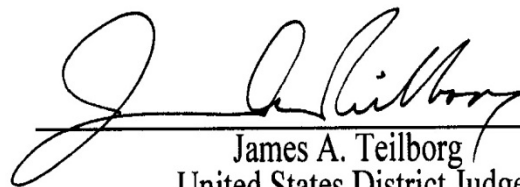
27 **IT IS ORDERED** that the Motion to Suppress Statements (*Miranda* and  
28 Voluntariness) (Doc. 99) is denied.

1           **IT IS FURTHER ORDERED** that the Motion to Suppress Evidence (Firearm  
2 and Ammunition) Based Upon Involuntary Consent to Search (Doc. 105) is denied.

3           **IT IS FURTHER ORDERED** that the Motion to Suppress Evidence (No  
4 Probable Cause for Arrest or Reasonable Suspicion for Stop) (Doc. 121) is denied.

5           **IT IS FINALLY ORDERED** that the Motion to Sever Defendant (Doc. 129) is  
6 denied as moot.

7           Dated this 28th day of November, 2012.

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11           James A. Teilborg  
12           United States District Judge  
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